NEECHOOTAALICHAAGAT CORP.

IBLA 83-768 Decided March 20, 1984

Appeal from a determination by the Bureau of Indian Affairs that Neechootaalichaagat Corporation is not eligible for status as a Native group. F-22910.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Native Groups

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that the five Native members are a father and four of his children and that although one of the children was an adult on the critical census date and was head of a household in another area, the living situation at the group locality was that of a single family or household with the father as the head of that family or household.

APPEARANCES: Judith K. Bush, Esq., and Andy Harrington, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Neechootaalichaagat Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Neechootaalichaagat Corporation has appealed from an April 28, 1983, determination by the Area Director, Bureau of Indian Affairs (BIA), to issue a Certificate of Ineligibility to Neechootaalichaagat for status as a Native group. 1/ The Area Director stated that the basis for the issuance of the certificate was: "Extensive field investigations by BIA personnel determined that the Neechootaalichaagat group is not composed of more than one family or household as required by 43 CFR 2653.6(a)(5)."

1/ 43 CFR 2653.6(a)(7) provides that "[a]ppeals concerning the eligibility of a Native group may be made to the Board of Land Appeals in accordance with 43 CFR Part 4, Subpart E."

The Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1627 (1976), was enacted to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a)(1976). Pursuant to 43 U.S.C. § 1613(h)(2)(1976), the Secretary of the Interior is authorized to "withdraw and convey to a Native group that does not qualify as a Native village, if it incorporates under the laws of Alaska, title to the surface estate in not more than 23,040 acres surrounding the Native group's locality." Such a conveyance would be made from "2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615" of ANCSA. 43 U.S.C. § 1613(h)(1976).

"Native group" is defined in 43 U.S.C. § 1602(d) (1976) as "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality." A "Native group" is distinguished from a "Native village" on the basis of numbers of Natives. A "Native village" is composed of 25 or more Natives. 43 U.S.C. § 1602(c) (1976). 2/

The Secretary promulgated regulations at 43 CFR Subpart 2653, regarding, inter alia, the eligibility of Native groups to select lands. The regulations at 43 CFR 2653.0-5(c) provide that a Native group will be "composed of less than 25, but more than 3 Natives." Thus, by regulation the Secretary determined a Native group had to consist of "more than 3 Natives."

The following facts from the record are undisputed. There are 10 Natives enrolled to Neechootaalichaagat. The locality of the group is at the confluence of Birch Creek and Muddy River, sec. 12, T. 12 S., R. 21 W., Fairbanks meridian. This land is presently within the boundaries of the Denali National Park. Two of the 10 members of the group are deceased and 2 were born after April 1, 1970, the 1970 census enumeration date. See 43 CFR 2653.6(a)(5). Of the remaining six, five claim the area as their principal place of residence on April 1, 1970. These are Alfred Starr, Sr., and four of his children, Paul Starr, Randolph Starr, Stanley Starr, and Martha Starr.

Members of Neechootaalichaagat have used the group site since at least 1945. Prior to that time Roosevelt John, the father-in-law of Alfred Starr, Sr., occupied the site. In 1945 there were four cabins on the site. Since 1970 there have been only two cabins. One was built by the Starrs in September 1970, and it has been in continuous use as a dwelling place. John filed an application for a 160-acre Native allotment encompassing the locality now claimed by the group. In 1966 Native allotment No. 50-67-0125 was issued to the heirs of John. Elizabeth Starr, the wife of Alfred Starr, Sr., was the sole surviving child of John. Elizabeth Starr died in 1979. The Starrs

2/ The definition of "Native village" in 43 U.S.C. § 1602(c) (1976) is: "[a]ny tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives[.]"

view this land and the improvements as owned collectively by all members of the family.

The BIA Report of Investigations (Report) states at page 10 that "there are two heads of households within the Neechootaalichaagat Corporation Native group, Alfred Starr, Sr., and Paul Starr." The Report further states at page 11 that "[a]ccording to Paul Starr he was financially independent of his family on April 1, 1970 and maintained a residence in Nenana during the summer months separate from his father's residence there." The Report concludes, however, at page 11, that the five members of Neechootaalichaagat who claimed Birch Creek as their principal place of residence on April 1, 1970, comprised one household.

The question presented by this appeal is whether BIA properly determined that the Neechootaalichaagat group was not composed of more than one family or household.

The applicable regulation, 43 CFR 2653.6(a)(5), reads as follows:

> (5) The Native group must have an identifiable physical location. The members of the group must use the group locality as a place where they actually live in permanent structures used as dwelling houses. The group must have the character of a separate community, distinguishable from nearby communities, and must be composed of more than a single family or household. Members of a group must have enrolled to the group's locality pursuant to section 5 of the Act, must actually have resided there as of the 1970 census enumeration date, and must have lived there as their principal place of residence since that date. 3/

Appellant argues that this regulation is invalid because it exceeds the authority of ANCSA by disqualifying many legitimate Native groups. Counsel for BLM correctly points out, however, that the Board is bound by duly promulgated regulations, citing McKay v. Wahlenmaier, 226 F.2d 35, 43 (D. C. Cir. 1955). The Board will not entertain an attack on the propriety of the regulations.

Appellant further contends that the BIA's interpretation of the regulation is erroneous as a matter of law. It argues that inclusion of "clan" in the definition of "Native group" evinces a Congressional intent to include at least multihousehold families as "Native groups." Appellant cites the Webster's Third International Dictionary 415 (1967), definition of "clan" as "a social unit smaller than a tribe and larger than a family and claiming descent from a common ancestor." Appellant asserts that the living situation of Neechootaalichaagat fits the clan definition in that there is a family group of common ancestry with more than a single household.

3/ Secretarial Order No. 3083, dated June 17, 1982, and entitled "Eligibility and Land Selections of Native Groups under the Alaska Native Claims Settlement Act," was issued pursuant to the authority of 43 CFR 2650.0-8 which permits the Secretary to waive any nonstatutory regulation implementing ANCSA. In section 4(a) of that order the Secretary waived "the phrase 'since that date' in 43 C.F.R. § 2653.6(a)(5) (1981)." That phrase is found at the end of the last sentence of the regulation.

Also, appellant asserts that family in a restricted sense may be used interchangeably with household and that the group is not a single family because both Alfred Starr, Sr., and Paul Starr were heads of households in 1970.

Appellant argues that the broad interpretation of "family or household" applied by BIA ignores the realities of Alaskan Native society in that Alaska Native communities ordinarily have common ancestral roots and the members often are closely related. In addition, it contends that the gathering of more than one family or household under one roof should not be sufficient for a determination of ineligibility, since such arrangements are traditionally common in Native communities where housing is scarce. Appellant believes that it is sensible to define the phrase "single family or household" narrowly to include only a nuclear family of parents with dependent children, living under one head or manager. It asserts that such an interpretation is mandated by the unique responsibility of the Federal Government to Alaska Natives.

Finally, appellant argues that due process requires that it be granted a right to a hearing prior to denial of entitlement of land under ANCSA.

Counsel for BIA in his answer responds that the BIA decision is consistent with ANCSA. He states that one of the basic purposes of ANCSA was to achieve a fair and just settlement of all claims by Natives and Native groups. He states that it was the intention of Congress to limit individual claimants to 160 acres such that Natives would be assured of receiving patent to lands where they were living. Counsel concludes that since the members of Neechootaalichaagat have received through inheritance title to the land on which they reside, the BIA determination which precludes a Native group land selection "is consistent with the intent of ANCSA to equitably settle the competing claims to land in Alaska" (Answer at 8). 4/

Counsel also points to the language of 43 CFR 2653.6(a)(5) which requires that there be "structures used as dwelling places." Counsel stresses the plural form indicating that its use was intentional. He states that the regulation clearly excludes family units such as the Starrs since even though there were multiple heads of household, the members who lived at the Birch Creek site lived in one structure and shared one dwelling house. He further asserts that the facts reveal only one family unit. Counsel contends that the definition of "Native group" with the use of terms like "tribe, band, clan, group, village, community or village association" implies a "plurality that is not existent in this case" (Answer at 10). Counsel asserts that this is simply a case of a father living with three sons and a daughter.

Counsel does not deny the general trust relationship to American Indians, but he states that ANCSA created no new trust responsibilities. He points out that it would be difficult to impose some sort of special trust responsibility on Native groups when Native group land claims must come from a pool of land subject to numerous Native competitors.

4/ Counsel states that in addition to the 160 acres owned collectively by the Starrs, Alfred Starr, Sr., has a pending Native allotment application for lands used by him in the general area of the group site (Answer at 9 n.1).

In response to appellant's claim that a hearing is necessary in this case, counsel states that this case involves a controlling question of law and that since no disputed facts are involved, no hearing is required.

[1] This case turns on the interpretation of that part of 43 CFR 2653.6(a)(5) which states that the Native group "must be composed of more than a single family or household." The terms "family" and "household" are used to define many relationships. The similarities and differences between the two terms were discussed by the court in Collins v. Northwest Casualty Co., 39 P.2d 986 (Wash. 1935), which stated at page 989:

> The word "household" is defined by the dictionaries and the courts as the members of a house collectively; a domestic establishment, including servants and attendants. The word has been considered as synonymous with the word "family." The word "family" is defined by Webster to be: "The body of persons who live in one house, and under one head or manager." While in a restricted sense the word "family" may be used interchangeably with "household," there is a difference in the ideas suggested by the two words. The word "family" conveys the notion of some relationship, blood or otherwise. In its most common use, the word implies father, mother, and children, immediate blood relatives; but the word is also used to designate many other and extended relationships. On the other hand, the word "household" is definite in its application. If we speak of the "Adams family," we may have reference to the immediate domestic circle of a particular person by that name, or we may mean all persons of the blood of the second President. If we speak of the "Adams household," however, we can mean only a single domestic establishment whose head is of that name. Our conception of a household involves the existence of a householder as its head, whose personality gives life to that small social unit. Without a householder, there is no household. Upon the death of the householder, the house may remain, with its effects and its other members, but it is no longer the household of its former head. Another may succeed to the ownership of the house and its contents, and become the head of a household therein, but another household -- the household of the successor.

Clearly, since Native group eligibility may hinge on the family or household status at a particular group locality, the broad definition of family, as encompassing extended relationships, should not be imposed in this case to overly restrict such eligibility.

In this case, however, we are not dealing with an extended relationship. The five Natives who claim that the Birch Creek area was their principal place of residence on April 1, 1970, are immediate blood relatives. They are four children and their father. This is a relationship that would commonly be defined by the word "family." Appellant has argued that if family and household are viewed as interchangeable terms, the group is not a single family because Paul Starr and Alfred Starr, Sr., according to BIA, were both heads of household in 1970.

The BIA Report states at pages 10-11 that there are two heads of household within the group; that Paul Starr was financially independent of "his

family" on April 1, 1970; and that he maintained a residence in Nenana during the summer months separate from "his father's residence there." Under the heading IV. SUMMARY on page 11 of the Report, BIA states: "The five members who claimed the Birch Creek as their principal place of residence composed one household on April 1, 1970, that of Alfred Starr, Sr."

Appellant has seized on the BIA statement that there were two heads of household; however, examination of the facts reveals that the BIA summary statement is the correct characterization.

Paul Starr indicated that he lived separately from his father when in Nenana and that he was financially independent on April 1, 1970, at which time he was 29 years old. 5/ But, there is no evidence in the record of any separate family or household situation when the father and siblings lived at Birch Creek -- the critical locality. This is true even though Paul Starr may have lived separately while away from Birch Creek. 6/

The facts indicate that although Paul Starr responded that he was head of a household in Nenana, when he resided at Birch Creek he considered himself to be a member of the Alfred Starr family. For purposes of determining Native group eligibility at the Birch Creek locality on April 1, 1970, there existed Alfred Starr, Sr.'s household composed of the father, a 29-year-old son, a 14-year-old son, 12-year-old daughter, and a 10-year-old son. That group must be considered a single family or household under the head of Alfred Starr, Sr., even though an adult son was residing with him. While Paul Starr may have been head of a household in Nenana, when he resided at Birch Creek with his father in one dwelling place, the living situation was that of a single household -- with Alfred Starr, Sr., as the head of that household.

Appellant stated that the legislative history of section 14(h)(2) of ANCSA, 43 U.S.C. § 1613(h)(2) (1976), indicates that the rationale for that section was to provide protection for Native groups that did not qualify as eligible villages and to avoid hardships, citing S. Rep. No. 925, 92nd Cong., 1st Sess. 142-43 (1970). Appellant argues that the BIA interpretation contravenes Congressional intent.

5/ The word "family" may include an adult child. Watson v. Burley, 143 S.E. 95, 96 (W. Va. 1928); Black's Law Dictionary 728 (rev. 4th ed. 1968). 6/ Included as part of Appendix E to the BIA Claims Examiner's Report is the affidavit of Alfred Starr, Sr. In response to the question, "Were you the head of the household or a member of a family within the Birch Creek area on April 1, 1970? If yes, identify the family or household," Alfred Starr, Sr., stated, "Yes, I was the head of the Alfred Starr family" (Examiner's Report at 35-36). The affidavit of Paul Starr also appears as part of that appendix. In response to the same question Paul Starr stated, "I am a member of the Alfred Starr family -- but we were all in Nenana. In Nenana I was the head of my own household on 4-1-70" (Examiner's Report at 38-39). Paul Starr stated in response to the question of whether he resided in the Birch Creek area on April 1, 1970, "[N]o, I was in Nenana, because that spring I returned to Nenana to find work in late March." Id. Alfred Starr, Sr., answered the same question stating, "Yes, in the cabin on Birch Creek" (Examiner's Report at 35-36).

That claim by appellant does not withstand close scrutiny. In this case possession of the group locality by the members of Neechootaalichaagat Corporation is protected by the fact that they have received through inheritance the 160-acre Native allotment of Roosevelt John on which they reside. Thus, to that extent in this case the interpretation by BIA has not imposed any hardship on the members.

The facts in this case are undisputed. Our resolution of the appeal deals with the application of those facts to our legal interpretation of the controlling regulation. Thus, appellant's request for a fact finding hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 as amended, 47 FR 26390 (June 18, 1982), the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Franklin D. Arness
Administrative Judge